

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

THOMAS K. MILLS,

Plaintiff,

v.

ZACHERY JONES, et al.

Defendants.

No. 1:23-cv-01214-JLT-SAB (PC)

FINDINGS AND RECOMMENDATION
RECOMMENDING PLAINTIFF'S THIRD
MOTION FOR SUMMARY JUDGMENT BE
DENIED, WITHOUT PREJUDICE

(ECF No. 55)

Plaintiff is proceeding pro se and in forma pauperis in this action filed pursuant to 42 U.S.C. § 1983.

Currently before the Court is Plaintiff's third motion for summary judgment, filed April 22, 2024. (ECF No. 55.)

I.

DISCUSSION

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party moving for summary judgment must include a "Statement of Undisputed Facts." Local Rule 260(a). Furthermore, this Court's local rule requires each motion of summary judgment to include "a 'Statement of Undisputed Facts' that shall enumerate discretely each of the specific material facts relied upon in support of the motion and cite the particular points of

1 any pleading, affidavit, deposition, interrogatory answer, admission, or other document relied
 2 upon to establish that fact.” To establish the absence of a genuine factual dispute, Plaintiff must
 3 cite “to particular parts of materials in the record, including depositions, documents,
 4 electronically stored information, affidavits or declarations, stipulations (including those made for
 5 purposes of the motion only), admissions, interrogatory answers, or other materials ...” Fed. R.
 6 Civ. P. 56(c)(1)(A); see also Local Rule 260(a). Plaintiff’s Motion fails to comport with Fed. R.
 7 Civ. P. 56(a) and Local Rule 260(a).

8 In the instant motion, Plaintiff seeks summary judgment on the merits of his excessive
 9 force claim against Defendants Zachery Jones and Javier Rivera. Plaintiff’s motion for summary
 10 judgment is premature pursuant to Rule 56 of the Federal Rules of Civil Procedure because
 11 summary judgment generally follows discovery. Although Rule 56 allows a party to file a motion
 12 for summary judgment “at any time,” the rule also allows the court, as is just, to deny the motion
 13 or order a continuance for the opposing party to pursue discovery. Fed. R. Civ. P. 56. Here, the
 14 Court just issued the discovery and scheduling order on April 10, 2024, and the parties have not
 15 yet had the opportunity to engage in discovery. As stated in the January 2, 2024, Findings and
 16 Recommendations, “Defendants are entitled to an opportunity to pursue discovery before
 17 responding to a summary judgment motion and Defendant have not been provided an opportunity
 18 to complete discovery.” (ECF No. 37 at 2:19-21.) Accordingly, Plaintiff’s third motion for
 19 summary judgment should be denied as premature. Plaintiff may file a motion for summary
 20 judgment that incorporates after obtaining all relevant materials following completion of
 21 discovery as contemplated by Rule 56. See, e.g., Moore v. Hubbard, No. CIV S-06-2187 FCD
 22 EFB P, 2009 WL 688897, at *1 (E.D. Cal. Mar. 13, 2009) (recommending that pre-discovery
 23 motion for summary judgment be denied as premature); see also Burlington N. Santa Fe R.R. Co.
 24 v. Assiniboine & Sioux Tribes of Fort Peck Reservation, 323 F.3d 767, 773 (9th Cir. 2003)
 25 (noting that when “a summary judgment motion is filed so early in the litigation, before a party
 26 has had any realistic opportunity to pursue discovery relating to its theory of the case,” the district
 27 court should grant requests by non-movants to take discovery prior to considering the motion for
 28 summary judgment); Vining v. Runyon, 99 F.3d 1056, 1058 (11th Cir. 1996) (“A premature

1 decision on summary judgment impermissibly deprives the [defendants] of their right to utilize
2 the discovery process to discover the facts necessary to justify their opposition to the motion”).

3 **II.**

4 **RECOMMENDATION**

5 Based on the foregoing, it is HEREBY RECOMMENDED that Plaintiff’s third motion for
6 summary judgment be denied as premature.

7 This Findings and Recommendation will be submitted to the United States District Judge
8 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **fourteen (14)**
9 **days** after being served with this Findings and Recommendation, Plaintiff may file written
10 objections with the Court. The document should be captioned “Objections to Magistrate Judge’s
11 Findings and Recommendation.” Plaintiff is advised that failure to file objections within the
12 specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834,
13 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

14 IT IS SO ORDERED.

15 Dated: **April 23, 2024**

16 
17 UNITED STATES MAGISTRATE JUDGE